2011-Ohio-2191

STATE OF OHIO, ex rel., ATTY. GENERAL OF OHIO, Plaintiff-Appellee

v.

STATE LINE AGRI, INC., et al., Defendants-Appellants

C.A. No. 2010 CA 11

Court of Appeals of Ohio, Second District, Darke

May 6, 2011

Civil appeal from Common Pleas Court T.C. NO. 08CV64753

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JACK A. VAN KLEY, Atty. Reg. No. 0016961, Attorney for Defendants-Appellants

OPINION

FROELICH, J.

{¶ 1} State Line Agri, Inc., (b)(6) and (b)(6) appeal from a judgment of the Darke County Court of Common Pleas, which found that they had violated Ohio's Livestock Environmental Permitting Program (LEPP) statute, Ohio's Water Pollution Control Act, and the permits issued to State Line Agri under those statutes. The court assessed civil penalties and ordered injunctive relief for those violations. For the following reasons, the trial court's judgment will be affirmed in part, reversed in part, and remanded for further proceedings.

I

{¶ 2} State Line Agri, Inc. ("SLA") is a livestock company that operates two hog confinement facilities in Ohio, one in Darke County and the other in Mercer County. The company is owned equally by (b)(6) and (b)(6); (b)(6) is solely responsible for operational and management decisions regarding corporate matters. SLA employs various individuals to oversee daily operations and to complete required tasks assigned by (b)(6) SLA's employees included (b)(6) who was charged to oversee record keeping and administrative duties, (b)(6) and (b)(6) Two of (b)(6) and (b)(6) also worked for SLA.

{¶ 3} The facility in Darke County ("the (b)(6) facility") is located at (b)(6) south of Ansonia, Ohio, and is in the Stillwater River watershed. The (b)(6) facility raises approximately (b)(6) hogs from feeder pig size to market weight. Based on the size of this facility and the number of buildings, the (b)(6) facility was subject to regulation by the Ohio Environmental Protection Agency ("Ohio EPA") and the Ohio Department of Agriculture ("ODA"); the regulations are set forth in the Ohio's Water Pollution Control Act (R.C. Chapter 6111), Ohio's Livestock Environmental Permitting Program (LEPP) statute (R.C. Chapter 903), and the Ohio Administrative Code. The implementation of these regulations is documented in extensive documents known as the Permit to Operate ("PTO") approved by the ODA and the National Pollution Discharge Elimination System ("NPDES") permit approved by the Ohio EPA. The regulatory purposes include prevention of pollution into waters of the State of Ohio and promoting use of best farming management practices. Regulatory methods include both self-monitoring by the permittees and on-site inspections from regulators.

{¶ 4} Due to repeated manure storage pond overflows at the (b)(6) facility in 2003, the Ohio EPA required SLA to submit an NPDES permit application. SLA was also informed of the need to apply for a PTO for the (b)(6) Facility. PTO No. STA-0001.PO001.DARK was issued to SLA for the (b)(6) facility on September 28, 2004. SLA ultimately submitted the required NPDES application, and the Ohio EPA issued NPDES Permit No. OHA000001, effective February 1, 2005.

{¶ 5} The facility in Mercer County ("the (b)(6) facility") is west of Celina, Ohio, and is in the Wabash River watershed. Due to the smaller size of the facility, the (b)(6) facility was not required to obtain an NPDES permit or a PTO.

{¶ 6} Stateline Resource Management, Inc. ("SLRM"), a company owned by (b)(6) performs manure application. "Manure application" includes spraying or spreading manure onto a land surface, injecting manure below the land surface into the crop root zone, and incorporating (i.e., mixing) manure into the soil with standard agricultural practices. SLRM pumps liquid manure from storage ponds or lagoons and sprays the manure onto the fields. (b)(6) operated SLRM as a sole proprietorship under the SLRM trade name until it became a limited liability company on September 14, 2007. Daily operational and management decisions for SLRM are made by (b)(6) was employed by SLRM to spread manure and assist in the

the application rate requirements in the two permits have "exactly the same purpose - preventing manure from running off frozen fields - not separate and distinct purposes."

{¶ 73} The State responds that the statutory framework of both R.C. Chapters 903 and 6111 mandate civil penalties for violations, and that the penalties are directed to different funds with separate purposes. The State emphasizes that the trial court could exercise its discretion in determining the appropriate penalty for each violation.

{¶ 74} R.C. Chapter 6111 is concerned with water pollution control. R.C. 6111.03 authorizes the director of the Ohio EPA to develop plans and programs for the "prevention, control, and abatement of new or existing pollution of the waters of the state." Among those duties, the Ohio EPA has the authority to "issue, revoke, modify, or deny" permits for the discharge of wastes into the waters of the state and to "set terms and conditions of permits, including schedules of compliance, where necessary." R.C. 6111.03(J)(1). Permit terms and conditions are to be designed to "achieve and maintain full compliance with the national effluent limitations, national standards of performance for new sources, and national toxic and pretreatment effluent standards" under the Federal Water Pollution Control Act. *Id.*

{¶ 75} R.C. 6111.04 imposes a general prohibition against polluting waters of the State. It reads: "No person shall cause pollution or place or cause to be placed any sewage, sludge, sludge materials, industrial waste, or other wastes in a location where they cause pollution of any waters of the state." R.C. 6111.07(A) further provides: "No person shall violate or fail to perform any duty imposed by sections 6111.01 to 6111.08 of the Revised Code, or violate any order, rule, or term or condition of a permit issued or adopted by the director of environmental protection pursuant to those sections. Each day of violation is a separate offense." Any person who violates R.C. 6111.07 "shall pay a civil penalty" of not more than $10, 000 per day of violation. R.C. 6111.09(A).

{¶ 76} Under R.C. 6111.09(B), money collected as civil penalties is divided evenly between two funds. One-half of the money is credited to the Environmental Education Fund. The exclusive use of that fund is "to develop, implement, and administer a program to enhance public awareness and the objective understanding within this state of issues affecting environmental quality." R.C. 3745.22(B). Money in the fund may be used for developing elementary and secondary school and collegiate curricula on environmental issues; providing training for Ohio's elementary and secondary school teachers on environmental issues; providing educational seminars for the public regarding the scientific and technical aspects of environmental issues; providing educational seminars regarding pollution prevention and waste minimization for persons regulated by the Ohio EPA; providing educational seminars for persons regulated by the Ohio EPA; and providing one or more scholarships in environmental sciences or environmental engineering for students enrolled at an eligible institution of higher education. *Id.*

{¶ 77} The remainder of the civil penalty must be credited to the Water Pollution Control Administration Fund, administered by the director of the Ohio EPA. Money in that fund must be used to supplement other money available for the administration and enforcement of R.C. Chapter 6111 and the rules adopted and terms and conditions of orders and permits issued under it. R.C. 6111.09(B).

{¶ 78} In 2000, the Ohio General Assembly enacted 2000 S.B. 141, effective March 15, 2001, to provide for the regulation of concentrated animal feeding facilities (CAFF) and concentrated animal feeding operations (CAFO) and to transfer authority from the Ohio EPA to the ODA to issue permits for the construction and modification of CAFFs and to issue NPDES permits to CAFOs. As a result of that legislation, the director of the ODA was required to develop a program to issue permits to install (R.C. 903.02) and permits to operate (R.C. 903.03). A permit to operate includes a manure management plan that conforms to best management practices regarding the handling, storage, transportation, and land application of manure, as well as an insect and rodent control plan, mortality management plan, emergency response plan, and the operating record requirements.

{¶ 79} R.C. 903.16(C) and (D) authorize the attorney general, upon the written request of the director of the ODA, to bring a civil action against a person who has violated the terms of a PTO. A person who has committed a violation "shall pay a civil penalty" of not more than $10, 000 per violation. R.C. 903.16(D)(3). "Each day that a violation continues constitutes a separate violation." *Id.* All monies collected from civil penalties under these provisions are deposited in the Livestock Management Fund, which is used solely in the administration of R.C. Chapter 903. R.C. 903.19.

{¶ 80} The interplay between R.C. Chapter 903 and R.C. Chapter 6111 is addressed in both chapters. After the ODA program was finalized, authority to issue and enforce permits to install was transferred from the Ohio EPA to the ODA. R.C. 903.04(B); R.C. 6111.03(J)(1)[2]. R.C. 903.08(A)(1) authorized the director of the ODA to participate in NPDES and to submit the program to the United States EPA for approval. After approval by the United States EPA, the authority to enforce NPDES permits concerning the discharge of manure or storm water from an animal feeding facility would be transferred from the Ohio EPA to the ODA. R.C. 903.08(A)(2); R.C. 6111.03(J)(1). Thereafter, "no person shall discharge manure from a point source into waters of

considering that the heavy rainfall occurred after 5:00 p.m. on March 1. The State argues that the discharge was caused primarily by the melting snow and thawing that occurred on both February 28 and March 1, 2007.

{¶ 119} There was substantial evidence that the February 28 land application resulted in ponding and runoff on March 1, 2007. However, we do not find that there was competent, credible evidence to support the trial court's conclusion that a discharge of manure into waters of the State also occurred on February 28.

{¶ 120} At the outset, we emphasize that the trial court was not required to credit the testimony of (b)(6) and (b)(6) that they did not observe any discharge from the application field. Moreover, the State was not required to supply direct evidence by way of eyewitness testimony that a discharge occurred on February 28 in order to refute that testimony.

{¶ 121} Nevertheless, the State's evidence must have been sufficient to support a reasonable inference that a discharge occurred. At stated above, the State relied primarily on evidence that the temperature on February 28 was above-freezing for most of the day and that Defendants had applied an excessive amount of liquid manure on the snow covered and frozen land. These facts reasonably suggest that some of the snow would have melted, causing the manure to mix with snow melt, but there is no evidence that a run-off stream and discharge to waters of the State resulted on February 28. The temperature on March 1 never fell below freezing and was significantly warmer than on February 28. Moreover, unlike February 28, rain fell throughout the day on March 1. Although Pence testified that excessive manure combined with snow melt and precipitation would cause ponding on saturated ground, there was no expert testimony to explain whether the excessive manure application and snow melt on February 28 was likely to have caused the run-off to begin on that date, given the rising and falling temperatures and lack of precipitation. Similarly, there was no expert testimony to explain why the significant run-off stream that was depicted in Pence's photographs likely would not have begun on March 1, given the precipitation and higher temperatures on that date. The trial court's conclusion that the discharge began on February 28 was based on speculation that the snow melt on February 28, coupled with the excessive manure application, was substantial enough to cause a runoff stream that discharged into waters of the State.

{¶ 122} The sixth, seventh, and eighth assignments of error are sustained.

VIII

{¶ 123} Appellants' ninth assignment of error states:

{¶ 124} "THE COURT ERRED BY FINDING LIABILITY UNDER COUNT 23 FOR FAILING TO PROVIDE MANURE ANALYSES TO THIRD PARTIES TO WHOM THE MANURE WAS GIVEN, BECAUSE THIS REQUIREMENT DOES NOT APPLY WHEN THE PERMITTED FARM IS RESPONSIBLE FOR THE MANURES APPLICATION."

{¶ 125} In their ninth assignment of error, Appellants claim that the trial court erred in finding that SLA, (b)(6) and (b)(6) had failed to provide manure analyses to third parties, as required by the Manure Management Plan in SLA's PTO.

{¶ 126} The Manure Management Plan portion of SLA's PTO specifically states that it would use the "distribution and utilization" method of manure management. "Distribution and utilization" involves the distribution of manure to others outside the control of the permitted owner or operator and any employees of the facility. (See Tr. at 140, 659.) An owner has control over the land application if the owner applies manure on land it owns, if the owner performs the manure application on another's land, or if owner dictates the rate and timing of manure application. (Tr. at 140, 660.) In short, the distribution and utilization method would not allow for land application by the owner of the facility.

{¶ 127} When manure is given or sold to another farmer under the distribution and utilization method, the recipient is responsible for determining when the manure is applied, how much is applied, and the conditions of which it is applied. (Tr. at 660). The facility providing the manure then has the responsibility to document who took the manure, how much was taken, when it was taken, and the fact that the farmer received a manure analysis and the land application restrictions. (*Id.*)

{¶ 128} SLA's PTO states that it uses distribution and utilization by "giving manure to another farmer." It indicates that SLA hires custom applicators for land applying liquid manure, and that it does not own any application equipment. In addition, the PTO stated that all manure is exported to others, and that applications of lime, other fertilizers, and other soil amendment decisions would be made by the farmers receiving SLA's manure through sale or gift from SLA. The PTO further provided:

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{¶ 129} "If manure is to be managed through Distribution and Utilization then the owner or operator shall receive a written agreement signed by the person accepting the manure that states: ' *I have been provided with a copy of analytical results that list the nutrient content of the manure and total quantities of manure. The manure will be distributed and utilized according to the best management practices and according to any state laws regulating these uses.' Rule 901:10-1-11* " (State's Ex. 2, p.65)(emphasis in original.)

{¶ 130} In Count 23, the State alleged that SLA and (b)(6) failed to provide recipients of manure with nutrient analyses related to the manure and that SLA failed to receive written agreements from manure

recipients acknowledging receipt of the analytical results. The State subsequently moved for summary judgment for failure to provide manure analyses to manure recipients and obtain written agreements acknowledging receipt of the analyses on February 28, March 30, April 9-10, July 3, August 7-8, August 11, August 15, and November 5-6, 2007.

{¶ 131} The trial court granted summary judgment to the State on this Count. The court reasoned: "While the Defendants may have entered into manure distribution agreements which permitted manure distribution on their [i.e., others'] land, these agreements are not the same as acknowledged receipt of the nutrient analysis information. There is no dispute of material fact in this regard. The Court determines that Defendants failed to obtain the signed acknowledgments and failed to maintain the acknowledgments in the operating records. Plaintiff is entitled to summary judgment on this issue. The question of damages and civil penalties, if any, is reserved for the Court's determination at trial."

{¶ 132} In its post-trial decision and entry, the trial court acknowledged its prior grant of summary judgment and assessed civil penalties against SLA, (b)(6) and (b)(6)

{¶ 133} Appellants assert that the trial court erred in finding them liable for failing to provide manure analyses when the court had determined that SLA controlled the land applications performed by (b)(6) They argue that the finding of liability for failing to provide manure analyses was inconsistent with the finding that SLA controlled the land application of manure. Appellants further argue that the court erred in assessing a penalty of $100 against (b)(6) when he was not named in Count 23 of the complaint.

{¶ 134} The State acknowledges that its claims in Counts 9 through 22 related to the land application of manure on February 28, 2007, conflict with its claim in Count 23 for failure to provide manure analyses to another farmer on that date. The State further concedes that they did not seek a penalty against (b)(6) The State argues, however, that there was ample evidence to support the conclusion that SLA managed its manure through distribution and utilization after February 2007.

{¶ 135} In its decision and entry, the trial court found that SLA and (b)(6) controlled the land application of manure on February 28, 2007. In addressing Count Nine, the court expressly rejected Defendants' argument "that SLRM acted in its sole judgment to spread the manure since the operations are so closely related, there was proof of dual employment of (b)(6) by SLRM and SLA, the ownership of 6 acres by SLA and the obligation of SLA to comply with regulations." Discussing the scope of (b)(6) liability generally, the court further stated:

{¶ 136} "(b)(6) conducted the manure distribution in February, 2007 at two locations near (b)(6) (the 36 acre tract and the 6 acre tract). Since the articles of organization for SLRM as a limited liability company were not filed until September, 2007, he was acting as an individual contractor for SLA under the business name of SLRM. [Pl. Exs. 94A-94D, 95.] Since SLRM was not organized until after the events involved herein, SLRM is not responsible for the actions of (b)(6) (b)(6) prior to its organization. By operating SLRM in a regulated business such as agricultural manure management, (b)(6) held himself out as being qualified and competent to conduct manure distribution practices as required by law. Accordingly, the Court finds that (b)(6) is determined to be responsible for any violations of statutory and administrative codes for his conduct in February, 2007. (Counts IX to XIII, XV, XVIII to XXIII). R.C. 6111.07."

{¶ 137} The trial court did not find through these statements that (b)(6) had land applied manure at the direction of SLA or (b)(6) after February 28, 2007, and there are no specific findings elsewhere in the decision and entry regarding whether SLA or (b) (b)(6) controlled the land application of manure after that date. In finding in favor of the State on Count 23, the court implicitly found that, after February 28, 2007, SLA no longer controlled the land application of manure by Neal Kremer.

{¶ 138} The parties presented substantial evidence concerning SLA's control of SLRM's land application of manure. According to Pence's testimony at trial, SLA had no records of manure removal by distribution and utilization after April 19, 2006. (Tr. at 349, State's Ex. 47) The 2007 manure removal records indicated that manure was removed from SLA on February 27, February 28, March 30, April 9, April 10, July 3, 2007, November 5, and November 6. Pence believed "that it was being removed by the facility and land applied under the control of the facility;" her inspection reports for the July and December 2007 inspections of SLA noted the dates of manure removal and the number of acres on which the manure was applied and that SLA had purchased manure application equipment. (*Id.* at 348-49.)

{¶ 139} SLA's records contained no written agreements from recipients. Pence testified that SLA's records indicated that the February 27 and 28 removal of manure was performed by SLA. (b)(6) testified that (b)(6) and (b)(6) had asked him to land apply manure from SLA onto others' lands. The parties presented evidence of payments for work for SLRM by check from SLA, (b)(6) insurance documentation, loan documentation, and conversations and e-mail communications from SLA to ODA inspectors, all of which related to the relationship between SLA and SLRM. Suffice it to say, there was extensive support for the trial court's conclusion that SLA controlled the land application of manure on February 28,

discharge event.

{¶ 156} "138. In violation of Ohio Adm. Code 901:10-1-10, and the terms and conditions of PTO No. STA-0001.PO001.DARK, Defendant State Line, Defendant (b)(6) Defendant (b)(6) Defendant (b)(6) fendant (b)(6) caused manure to be disposed of on February 27 and 28, 2007 by land application and not distribution and utilization.

{¶ 157} "139. The conduct alleged in this Count constitutes violations of Ohio Adm. Code 901:10-1-10, and the terms and conditions of PTO No. STA-0001.PO001.DARK, for which Defendant State Line, Defendant (b)(6) Defendant (b)(6) (b)(6) Defendant (b)(6) and Defendant (b)(6) ect to injunctive relief pursuant to and for which these Defendants are liable to pay the State of Ohio civil penalties of up to ten-thousand ($10, 000) dollars for each day of each violation."

{¶ 158} Counts 10 through 22 of the State's complaint incorporated the facts alleged in Count 9. These additional counts addressed the specific instances of misconduct, such as the lack of prior approval, excessive application rate, the deficient residue cover, lack of monitoring, and failure to properly notify and submit written reports.

{¶ 159} In seeking summary judgment, the State interpreted Count Nine narrowly. It stated that Count Nine concerned Defendants' "failure to obey the PTO requirements for distribution and utilization," alleged in paragraph 138 of the complaint. The motion contrasted "distribution and utilization" from "land application" and argued that land application is unavailable to an owner or operator who chooses distribution and utilization. The State did not address any of the procedures by which Defendants had land applied the manure as part of Count Nine. In its summary judgment decision, the court found genuine issues of material fact existed as to whether distribution and utilization was used on February 28, 2007. (Because the manure was land applied to SLA's lands on February 27, 2007, the court granted summary judgment to the State and against SLA as to the use of the land application method on that date.)

{¶ 160} In its post-trial brief, the State again confined its arguments to whether SLA managed its disposal of manure through distribution and utilization or land application. After extensive discussion of the evidence at trial, the State argued: "For the reasons addressed above, Defendants have violated the terms and conditions of the PTO requiring distribution and utilization by controlling land application of manure for two independent reasons: Defendant State Line Agri, Inc. employees conduct[ed] the land application and Defendants controlled the timing and amount of manure applied."

{¶ 161} In the decision and entry following trial, the trial court interpreted Count Nine broadly, stating that the State bad alleged that (b)(6) spread manure from SLA on two trac committed the following violations:" an excessive distribution rate, failure to monitor drainage, application of manure when prohibited by the weather forecast, failure to prevent ponding and run-off, failure to timely notify regulators after pollution ran-off the field into waters of the State, and failure to provide written reports of the incident. As quoted above, the trial court found, in part,

{¶ 162} "The testimony and exhibits [Pl. Exs. 37-45] demonstrate that SLA and SLRM failed to follow regulations regarding spreading manure on both tracks of frozen fields, including spreading excessive quantities of manure on frozen fields with low residue cover, failing to prevent ponding and run-off, failing to comply with weather restrictions, failing to monitor, failing to timely notify regulators after the run-off, and failing to timely provide written reports. Plaintiff has proven its case on these allegations against SLA, (b)(6) (b)(6) ***" The court assessed fines of $10, 000 for (February 28, 2007, and March 1, 2007) against SLA and (b)(6) and fines of $1, 000 for each day against (b)(6)

{¶ 163} The State argues that the court's aggregate $22, 000 fine was directed solely to Defendants' unauthorized use of land application rather than distribution and utilization. The State notes that the court imposed the maximum penalty of $10, 000 per day for each application against SLA and (b)(6) indicating that the court awarded only a single penalty for using an improper method of manure management.

{¶ 164} We disagree. The trial court's discussion of Count Nine does not specifically mention the failure to use distribution and utilization. Rather, it speaks of failing to follow the regulations regarding the spreading of manure and gives the specific instances of misconduct (e.g., excessive application rate) as the alleged "violations." In addition, in other portions of the decision and entry, the trial court indicates that it had found that several regulation violations had occurred in Count Nine. For example, in discussing Counts 18 and 19, the court stated that regarding "Count IX, the Court determined that excessive manure was distributed on a 36 acre tract on February 27 and 28, 2007."5 Counts 20 to 22 refer to the court's "prior findings" that manure had spilled off the 36 acre tract into waters of the State. In short, the language of the decision and entry reflects that the court's findings as to Count Nine included the specific instances of misconduct alleged in other counts. We cannot assume that the trial court's monetary assessment was limited to Defendants' use of land application rather than distribution and utilization.

{¶ 165} Appellants argue that the trial court "double counted" the violations in Counts 12 and 18. Count 12

Ohio Outdoor News - May 9, 2008, Page 3

THREE POLLUTION EVENTS handled in one week

by Mike Moore, Editor

South Solon, Ohio - A 7-mile section of Paint Creek through Madison and Fayette counties ran black with manure slurry for eight days in April before authorities were notified.

The spill resulted from manure running into a field tile and then into the creek, said David Lane, a wildlife officer supervisor for the DNR Division of Wildlife.

The spill killed fish in the East Fork of Paint Creek, but the number is unknown, Lane said. "A lot of fish that died had already gone through the system, so we just counted the ones we could find," he said.

The Madison-Fayette county spill marked the start of a busy April for wildlife officers in central Ohio, who investigated three "pollution-related" fish kills. In all more than 25,000 fish were found dead in more than 20 miles of streams, according to the Division of Wildlife. "Some of these things are accidents" Lane said. "And others are gross negligence, and those are the ones we'd like to curtail."

A manure spill into Lake Fork of the Licking River northeast of Johnstown during the same week killed more than 22,000 fish, including bass, bluegills, and minnows. That spill, Lane said, is believed to have been caused by a over-application of manure on a farm field. The Division of Wildlife could seek more than $10,000 in restitution for wildlife killed in this case, Lane said. About 12 miles of the stream was fouled by the spill.

In Franklin County, a milk spill from a dairy didn't cause an immediate fish kill in Blacklick Creek, but that could change, Lane said.
"The problem with milk is that it won't kill (fish) initially until the milk starts breaking down and takes away the oxygen," he said.

The Division of Wildlife will seek restitution against those found responsible for the spills, Lane said. Restitution values for fish and other animals are established by the American Fisheries Society, and are

considered by species and length (Ohio Outdoor News, March 28).

Lane said he cannot identify the suspected sources of the spills since no formal charges have been filed. It is up to the Ohio Environmental Protection Agency to file charges if anyone is found criminally negligent. "The only thing we can do is get restitution for the dead fish," Lane said. The Ohio Department of Agriculture could also take enforcement action against those with agricultural operating permits.

But, according to Kevin Elder, the department's executive director of the livestock environmental permitting program, the spills in Madison, Fayette, and Licking counties were likely the fault of a manure applicator, which are not permitted directly by the Department of Agriculture. "Unfortunately, there is very little that we can do against an applicator," Elder said. "We will rely on the Division of Wildlife's fines for that steam fish kill."

Elder said manure runoff events in streams are not all that common, but winter and spring weather conditions proved problematic this year. "We've been fairly lucky up until now that we typically don't have these types of problems," he said. "But, we didn't have a real good winter for application and they're trying to get manure out of the facilities because they were getting full and some of them didn't follow the regs".

903.07 [First of two Versions] Livestock manager certificatio 2-

(A) On and after the date that is established in rules by the director of agriculture, both of the following apply:

(1) The management and handling of manure at a major concentrated animal feeding facility, including the land application of manure or the removal of manure from a manure storage or treatment facility, shall be conducted only by or under the supervision of a person holding a livestock manager certification issued under this section. A person managing or handling manure who is acting under the instructions and control of a person holding a livestock manager certification is considered to be under the supervision of the certificate holder if the certificate holder is responsible for the actions of the person and is available when needed even though the certificate holder is not physically present at the time of the manure management or handling.

(2) No person shall transport and land apply annually or buy, sell, or land apply annually the volume of manure established in rules adopted by the director under division (E)(5) of section 903.10 of the Revised Code unless the person holds a livestock manager certification issued under this section.

(B) The director shall issue a livestock manager certification to a person who has submitted a complete application for certification on a form prescribed and provided by the director, together with the appropriate application fee, and who has completed successfully the required training and has passed the required examination. The director may suspend or revoke a livestock manager certification and may reinstate a suspended or revoked livestock manager certification in accordance with rules.

(C) Information required to be included in an application for a livestock manager certification, the amount of the application fee, and requirements regarding training and the examination shall be established in rules.

Effective Date: 11-05-2003

This section is set out twice. See also §903.07, as amended by 128th General Assembly File No. 12, HB 363, § 1, eff. 12/22/2009 and operative on the date on which the Administrator of the United States Environmental Protection Agency approves the National Pollutant Discharge Elimination System program submitted by the Director of Agriculture under section 903.08 of the Revised Code as amended by this act..

903.07 [See Note] Livestock manager certification

(A) On and after the date that is established in rules by the director of agriculture, both of the following apply:

(1) The management and handling of manure at a major concentrated animal feeding facility, including the land application of manure or the removal of manure from a manure storage or treatment facility, shall be conducted only by or under the supervision of a person holding a livestock manager certification issued under this section. A person managing or handling manure who is acting under the instructions and control of a person holding a livestock manager certification is considered to be under the supervision of the certificate holder if the certificate holder is responsible for the actions of the person and is available when needed even though the certificate holder is not physically present at the time of the manure management or handling.

(2) No person shall transport and land apply annually or buy, sell, or land apply annually the volume of manure established in rules adopted by the director under division (E)(5) of section 903.10 of the Revised Code unless the person holds a livestock manager certification issued under this section.

(B) The director shall issue a livestock manager certification to a person who has submitted a complete application for certification on a form prescribed and provided by the director, together with the appropriate application fee, and who has completed successfully the required training and has passed the required examination. The director may suspend or revoke a livestock manager certification and may reinstate a suspended or revoked livestock manager certification in accordance with rules.

(C) Information required to be included in an application for a livestock manager certification, the amount of the application fee, requirements regarding training and the examination, requirements governing the management and handling of manure, including the land application of manure, and requirements governing the keeping of

records regarding the handling of manure, including the land application of manure, shall be established in rules.

Amended by 128th General Assembly File No. 12, HB 363, § 1, eff. 12/22/2009 and operative on the date on which the Administrator of the United States Environmental Protection Agency approves the National Pollutant Discharge Elimination System program submitted by the Director of Agriculture under section 903.08 of the Revised Code as amended by this act.

Effective Date: 11-05-2003

This section is set out twice. See also §903.07, effective until 12/22/2009.

8. Distribution and Utilization

Quantity of nutrients managed via distribution and utilization:

Type of Distribution and Utilization

All manure and composted manure produced at the facility will be managed via distribution and utilization. (b)(6) Poultry Farms, Inc., may occasionally provide custom manure transportation and application services for manure users. The custom manure transportation and application services will only be done under the direction and guidance of the manure user. (b)(6) Poultry Farms, Inc., will not have any role in the management of the farmland receiving manure from their facility. Egg processing wastewater will be land applied primarily at the facility site, but also may be distributed.

- ✓ Sale/distribution/donation of manure to a broker for use as soil nutrient
- ✓ Sale/distribution/donation of manure to a broker for use as compost
- ☐ Sale/distribution/donation of manure to a broker for use in vermiculture
- ☐ Sale/distribution/donation for fuel source alternatives.
- ☐ Giving manure to another farmer
- ✓ Composting manure for use as a soil amendment
- ☐ Composting manure for use in vermiculture
- ☐ Other (describe)

If manure is to be managed through Distribution and Utilization then the owner or operator shall receive a written agreement signed by the person accepting the manure that states: *"I have been provided with a copy of analytical results that list the nutrient content of the manure and total quantities of manure. The manure will be distributed and utilized according to the best management practices and according to any state laws regulating these uses."* Rule 901:10-1-11

- ✓ As the owner/operator I understand and acknowledge that the written agreement(s) regarding Distribution and Utilization, if used, shall be maintained in the **Operating Record.**

Attached is a copy of the form to be used in the **Operating Record** to record implementation of Distribution and Utilization. The form documents the dates and quantity of manure moved from the facility and lists the name of the recipient(s).

- ✓ Form attached **Please see the form in the Operating Record section of the Application Report.**
- ☐ Form is not attached for the following reason:

COMPLAINT INVESTIGATION

Date of Complaint: September 28, 2010

Time of Complaint: 11:37 pm

Complaint Received By: Kelly Harvey, via e-mail

Inspector: Mark Fritz

Complainant (name and address): Vickie Askins (b)(6)

Complaint Information: Ms. Askins alleges that a neighbor's daughter is hospitalized with pneumonia as a result of poultry manure from (b)(6) being spread on a windy day near (b)(6)

Facility Involved: (b)(6) Poultry Farms, Inc.

Follow-up Phone Call: Troy (b)(6)
:

Inspector Findings:
I received a phone call from Andy Ety, ODA-LEPP at 10:08 a.m., on September 30th that Ms. Askins had e-mailed an odor and nuisance complaint on behalf of an unnamed neighbor at an unnamed location. The complaint did indicate that it was in or near Jerry City.
I called (b)(6) of (b)(6) Poultry Farms and verbally relayed the complaint. He stated that (b)(6) had not spread any manure themselves this year, but that some local farmers had purchased manure through Distribution and Utilization agreements and had been spreading in that general vicinity. I asked (b)(6) to send me his Distribution & Utilization records. From these records, (b)(6) own conversations with his purchasers and a follow-up request to Ms. Askins for further information, it was determined that a local farmer, (b)(6) had purchased and transported 220 tons of litter on July 30, 2010. Some of this litter was stockpiled and spread on a field across the road from where the hospitalized daughter lives. (b)(6) then requested the Wood Soil and Water Conservation District to investigate the stockpiling and application procedures, as they are the regulatory agency in for this situation since the manure was not applied by a permitted facility or a Certified Livestock Manager.

Conclusion:
(b)(6) Poultry Farms transferred the manure, under Distribution and Utilization provisions, to a local farmer, (b)(6) who is under SWCD jurisdiction. Wood SWCD investigated upon request and their report should be available shortly.

Rec'd 7/30/11

WOOD SOIL & WATER CONSERVATION DISTRICT

2-6

Vickie A. Askins
(b)(6)
Cygnet, Ohio 43413

RE: Poultry CAFO Manure Applications June 2, 2011

Dear Vickie,

The Wood SWCD has authority under Chapter 1511 of the Ohio Revised Code (ORC) to investigate pollution of the waters of the state of Ohio from agricultural sediment and animal waste. The event that you are referring to with (b)(6) Poultry and (b)(6) has never been reported as a spill resulting in the pollution of the waters of the state. At this time, we do not have the authority to further investigate this complaint.

The Wood SWCD works on a voluntary basis with farmers to help them spread manure in a sensible manner on their fields. Best Management Practices (BMP's) have been developed to improve practices or combination of practices to reduce agricultural pollution to a level compatible with water quality goals. BMP's were utilized in the manure application that you site.

Odor is not under our authority to control or regulate.

Sincerely,

Jim Rickenberg

Jim Rickenberg
District Technician

Cc: Brad Espen
Wood County Commissioners
Nicki Kale
Dr. Bob Midden

1616 E. Wooster St. Box 32
Bowling Green, OH 43402

PHONE (419) 354-5517
FAX (419) 354-7923
E-MAIL jimrickenbergr@woodswcd.com
WEB SITE www.woodswcd.com

City of Columbus
Mayor Michael B. Coleman

Department of Public Utilities
Tatyana Arsh, P.E. Director

2-7

December, 12, 2008

Matt Gluckman
USEPA Region 5
Water Division (WN-16J)
77 W. Jackson Blvd.
Chicago, IL 60604

RE: Comments on Proposed CAFO Program Transfer from OEPA to ODA

Dear Mr. Gluckman:

Thank you for affording us the opportunity to comment on the proposed transfer of NPDES permitting authority from the Ohio Environmental Protection Agency (OEPA) to the Ohio Department of Agriculture (ODA). The City of Columbus (City) oversees a number of important watersheds that serve approximately 775,000 people in Columbus and approximately 2,000,000 in central Ohio.

The City has a number of concerns that should be addressed before approval of the transfer of permitting authority, especially given the recent September 2008 GAO Report on Concentrated Animal Feeding Operations which notes: "Although EPA is aware of the potential impacts of air and water pollutants from animal feeding operations, it lacks data on the number of animal feeding operations and the amount of discharges actually occurring." (Concentrated Animal Feeding Operations, GAO-08-944, September 2008, p. 23).

1. LAND APPLICATION RECORD-KEEPING

The first concern of the City is knowing where the land application of manure is occurring. Requiring CAFOs to retain records of land application onsite is not sufficiently protective. These records should be part of the government's public records that are available to the water supply authorities and the public upon request.

a. The City presently has an ongoing program to reduce the amount of phosphorous and nitrogen from farming operations through encouragement of best management practices and creation of buffer zones. Knowing where the land application of manure is occurring will assist the City in monitoring the oversight of these operations and in identifying any problematic nutrient sources in its source water protection areas.

b. OAC 901:10-1-06 (A)(4) requires that a livestock manure broker (buying, selling, or land

Utilities Complex — 910 Dublin Road — Columbus, Ohio 43215
Director's Office — 614/645-6141 — FAX: 614/645-8019 — TDD: 614/645-6454
Power and Water Division — 614/645-7020 — FAX: 614/645-8177 — TDD: 614/645-7188

Fairwood Complex — 1250 Fairwood Avenue — Columbus, Ohio 43206
Sewerage and Drainage Division — 614/645-7175 — FAX: 614/645-3801 — TDD: 614/645-6338

applying annually more than 4500 dry tons of manure or more than 25,000,000 gallons of liquid manure) or a livestock manure applicator (land applying more than 4500 dry tons of manure or more than 25,000,000 gallons of liquid manure) shall maintain an operating record which, in part, requires that certain information be kept for each "land application area" as per OAC 901:10-1-06.

While at least for certain levels of application, the record-keeping requirements contain needed information, they are limited in that they only apply to "land application areas". This term is defined in OAC 901:10-1-01(UU) to mean "...land under the control of a concentrated animal feeding operation owner or operator, whether it is owned, rented, leased, or subject to access agreement with the landowner, or otherwise under the control of the owner or operator, to which manure, or process wastewater from the production area is or may be applied." In effect, land applications of manure through brokers who sell or distribute the material to others who then apply on lands not under the "control" of the CAFO are completely removed from the recordkeeping requirement. Simply by creating a middle man for its manure, CAFOs can avoid important record-keeping requirements.

CAFOs should be required to identify all areas on which its manure is land applied. Records to ensure compliance with such requirements as proper setbacks and proper methods and rates of application should be kept for all land-applied manure locations. Absent such information, land applicators and ODA will be hard pressed to ensure that phosphate applications, as an example, do not exceed the limits set forth in proposed OAC 901:10-2-14(E)(3).

To remedy this gap in the regulation, ODA could require site specific authorizations prior to land application, similar to the requirements that apply for land applying biosolids in Ohio pursuant to OAC 3745-40-03 (J). This approach would provide ODA the opportunity to ensure that nutrient loadings are not exceeded for a given tract and the local utilities and the public a means to track where land application is occurring.

2. ENFORCEMENT

The level of enforcement is an additional concern. In its submittal to USEPA, ODA indicates that it has 4 Livestock Environmental Permitting Program inspectors. This number appears low given the new direct responsibilities that ODA is taking on in overseeing the NPDES CAFO permitting program and the additional monitoring and reporting requirements that it will be enforcing. Also, with the upcoming responsibility of reviewing Ohio's version of the nutrient management plans, and overseeing CAFOs that have left the regulatory regime, additional staffing will be needed.

3. SETBACK DISTANCES

Minimum setback/minimum distance requirements for land application of solid or liquid manure offer critical protections to watersheds. These restrictions are contained in proposed OAC rule 901:10-2-14. Of concern to the City are the restrictions protecting the surface waters of the state.

Table 2 imposes land application restrictions of 35 feet vegetative cover or a total setback of 100 feet from surface waters of the state. Footnote two of the table states that while either a 35 foot buffer strip must be present or a total setback of 100 feet must be maintained for surface application or surface incorporation within 24 hours or direct injection, as a compliance alternative, the CAFO may demonstrate that a setback or buffer is not necessary because implementation of alternative conservation practices or field specific conditions will provide pollutant reductions equivalent or better than the reductions that would be achieved by the 100 foot setback or 35 foot vegetative cover.

Unlike footnote 9 pertaining to land application restrictions for field surface furrows which requires prior approval of the Director in instances where one seeks alternatives to minimum setback provisions, footnote 2 is silent on whether prior agency approval is needed. Minimum distance restriction alternatives should not be implemented without such approval in all instances. Footnote 2 should incorporate the prior approval language of footnote 9.

An additional concern about the proposed minimum distance requirements is that they lack any requirement that land application not occur within a ground water source water assessment and protection area or wellhead protection area that has been delineated as such by Ohio EPA. This is a requirement that applies to the land application of biosolids pursuant to OAC 3745-40-04 (O).

In addition, if no delineated or endorsed ground water source water assessment and protection area or wellhead protection area exists, the isolation distance from a community public water system well should be 1000 feet, akin to what is required for land application of biosolids set forth in OAC 3745-40-04 (O).

4. NUTRIENT MANAGEMENT PLANS

a. New federal regulations promulgated in November 2008 require that nutrient management plans (NMPs) be made part of the CAFO NPDES permit and that as such, are to be public noticed prior to finalization. Ohio's version of the NMP is the manure management plan (MMP) whose terms are outlined in OAC 901:10-2-08.

The definition of the NMP should be clearer relative to Ohio's program. In the comment to the definition of "manure management plan" – proposed OAC 901:10-1-01 (YY) states the following:

> A person preparing a manure management plan is advised to refer to guidance on comprehensive nutrient management plans that have similar components for manure management plans. Comprehensive nutrient management plan standards are prepared and published by the Natural Resource Conservation Service, an agency of the United States department of agriculture. However, the scope of comprehensive nutrient management plans exceeds the requirements of Chapter 903. of the Revised Code and rules of the chapter.

Given the new federal regulations relative to NMP being part of the terms of the permit, there should not be any confusion as to what is obligated. There is confusion as to whether a manure management plan is different from a nutrient management plan which is different from a comprehensive nutrient management plan. If a NMP is required for parts of the regulated community it should be clear that that the scope of a MMP should be identical to a NMP.

b. While Ohio's program submittal to USEPA occurred prior to the above rule changes, Ohio's program should reflect these changes while it is still in the process of finalizing its program. The federal revisions offer important additional safeguards to the state program that should be incorporated simultaneous to, if not prior to, the approval of the permitting authority transfer.

Please contact me at 614-645-3753 should you have any questions regarding the above comments.

Sincerely,

Dominic J. Hanket

Dominic J. Hanket
Assistant Director, Regulatory Compliance

cc. Tatyana Arsh, Director, P.E.
Dax Blake, Administrator, Division of Sewerage and Drainage.
Richard C. Westerfield, Administrator, Division of Power and Water